

**PROTECT**

**In the First-Tier Tribunal (Health, Education and Social Care)  
Considered on Papers  
On Friday 19<sup>th</sup> April 2013**

**Before:**

**Deputy Chamber President Judge John Aitken  
Specialist Member Ms Bridget Graham  
Specialist Member Ms Wendy Stafford**

**Mrs Elaine Velma Brown  
(Cherubins Day Nursery)**

**Appellant**

**v**

**Ofsted**

**Respondent**

**[2013] 2031.EY-SUS**

**Decision**

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Procedure Rules, however, not only must both Parties consent, which they have but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case we have a good picture of the allegations made, the response and the level of risk present. From the papers, there appears to be no substantial factual dispute which might affect our decision and we consider that we can properly make a decision on the papers without a hearing.

2. The appellant appeals to the tribunal against the respondent's decision dated 21<sup>st</sup> March 2013 to suspend the appellant's registration as a child minder on the General Childcare Register under Section 69 of the Childcare Act 2006, for six weeks until 1<sup>st</sup> May 2013.

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3. The Tribunal makes a restricted reporting order under Rule 14 (1) (a) and (b) of the ***Tribunal Procedure (First tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008***, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents in this case so as to protect their private lives.

### Events leading to the issue of the notice of statutory suspension

4. The appellant has been a registered childminder since at least 2008 at the premises which styles itself “Cherubins Day Nursery”.

5. A schedule of incidents is produced which indicate the difficulties which have occurred at the nursery since 2008, that document is at page 81 of the papers. It reveals injuries in 2009, a bruised forehead to a child. 2 in 2010, a fingernail injury and an injury sustained jumping off a chair. One in 2011 when a child was burnt preparing hot food. The loss of a child on an outing in 2012 and another with a deep cut under an eye, the latter incident in April 2012 was not notified to Ofsted until after the current suspension and investigation commenced, a third when a child was injured in the garden, a fourth child's fingers injured in the front door, and a fifth child who again sustained burns preparing food.

6. The particular incident which led to Ofsted's investigation was one of force feeding a child whilst restrained in February 2013, a second child with a “pulled” arm in March 2013 and later in March 2013 a child with a cut mouth, swollen lip and bruising.

7. On 21<sup>st</sup> March 2013 a decision was taken to suspend the registration of the appellant given her sustained history of failure to maintain compliance with the Early Years Foundation Stage Welfare requirements, and she was notified accordingly, further representations were considered and the decision affirmed at a case review on 25<sup>th</sup> March 2013.

### The Law

8. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. This Act establishes two registers of childminders: the early years register and the general child care register. Section 69 (1) Act provides for regulations to be made dealing with the suspension of a registered persons' registration. The section also provides that the regulations must include a right of appeal to the tribunal.

9. Under the ***Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008*** when deciding whether to suspend a

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childminder the test set out in regulation 9 is:

*“that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.”*

10. The suspension shall be for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the respondent to monitor whether suspension is necessary.

“Harm” is defined in regulation 13 as having the same definition as in section 31 (9) of the **Children Act 1989**:

*“ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another”.*

11. The powers of the tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.

12. The burden of proof is on the respondent. The standard of proof ‘*reasonable cause to believe*’ falls somewhere between the balance of probability test and ‘*reasonable cause to suspect*’. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.

## Issues

13. Ofsted are concerned that the appellant has a history of failing to ensure that the children in her care are kept safe, they point to the incidents listed in the schedule and to 16 complaints since registration in 2008, and 20 notices to improve which have been issued between November 2008 and October 2012 and are detailed within the suspension notice, but include many relating to children’s safety.

14. The appellant, in her grounds of appeal states:

*“The service was suspended on 22<sup>nd</sup> March 2013 due to accidents and/incidents that has occurred at the setting since 2008, whilst I do not disagree that these had occurred. When these accidents have happened each one was investigated, actions or systems were put into place to minimise risk to our children. Where*

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*staff practice could have been improved, they were disciplined or dismissed.*

*The setting followed policies and procedures and actions to ensure those types of accidents did not happen again. I conclude that the setting could have had a full investigation without the need to suspend registration.”*

15. The appellant has also supplied a fuller response dated 15<sup>th</sup> April 2013 explaining the circumstances of the incidents and the Nursery’s response, each indicating an action taken to prevent reoccurrence.

16. We have also seen a number of letters of complaint from neighbours, we attach little weight to many of those which in general are directed at long term difficulties rather than the immediate issue of whether children will be protected from harm, but they do indicate that areas such as allowing children to climb tall trees in an unrestricted and unsupervised manner do relate to immediate safeguarding.

## **Conclusions**

17. We consider that the range and number of incidents at the Nursery indicate that there is presently a risk of harm to a child attending there. We note that despite the comments of the appellant that actions have been taken to ensure that accidents are not repeated, this does not seem to have decreased the number of accidents and incidents rather there appears to be an increase. Although some are incidents, such as force feeding, which are allegedly deliberate and one might have confidence would not be repeated during an investigation, there are a number such as burns and other physical injuries which are on the face of matters symptomatic of poor safety in general. We also note that there are repeated examples of absence of evidence of follow up action regarding previous incidents, which amount at the very least to a poor administrative system. At a meeting between the appellant and Ofsted on 27<sup>th</sup> March 2013 records of the incident of alleged restraint and force feeding were incomplete since a child aged about 10 was clearly seen to be involved on CCTV but nowhere recorded as being present, a verbal warning for the burning incident in August 2012 could not be found in the written records and an incident in the Nursery Garden in October 2012 which led to a written warning for a staff member could not be found, nor was there any record of a claimed attempt to notify an accident to Ofsted which occurred in April 2012. On the same day it was observed that some stairs which had been involved in an accident on 18<sup>th</sup> April 2012 were not padded and whilst the post accident action plan indicated that the area would be padded and this work was done the manager indicated she did not know how long the steps had again been without padding.

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18. Whilst it may be said that the injuries are mostly minor and children will easily recover it is also the case that many of the injuries, such as burns and finger injuries could be serious and lead to permanent consequences and it is a matter of chance how serious such an incident may turn out to be. We bear in mind that there will be some accidents in the very best run nurseries, however the range and frequency of reported incidents and evidence of other situations is such that at present we consider that Ofsted have established that children cannot be said to be safe at those premises. We appreciate that a decision to suspend is one that is taken at a particular time and taking into account a background of past incidents and is often not a precise science, but we consider that suspension at this time is the only proper way to deal with this matter.

19. We note also that the appellant although accepting the incidents and relying upon her past actions to prevent reoccurrence does not indicate that there is a need to change anything in particular about her current approach. We do not consider that this is sufficient given the history of difficulties which have been brought to our attentions.

**Decision**

The appeal against interim suspension is dismissed, the suspension is confirmed.

**Judge John Aitken  
Deputy Chamber President  
Health Education and Social Care Chamber  
Monday 22<sup>nd</sup> April 2013**